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IN THE

# Supreme Court of the United States

October Term, 1969

No. 852

HYMAN STERNMAN,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## PETITIONER'S REPLY MEMORANDUM

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## PETITIONER'S REPLY MEMORANDUM

This reply memorandum is limited to the following points made in the opposing brief of the United States:*

### 1. Concerning the Trial Court's Failure to Offer Petitioner an Opportunity to Explain the Basis of His Defense of Self-Incrimination, a Procedure Now Suggested in the Government's Brief

The crux of the Government's argument (Gov't brief p. 9) is that petitioner was required to present an explana-

* We believe that all other arguments in the opposing brief are sufficiently discussed in the petition for certiorari.

tion in order to "suggest" that his fear "of prosecution under foreign laws is 'real and appreciable'," before he could invoke the defense of the insufficiency of the grant of immunity to insulate him under Canadian laws.** Assuming, *arguendo,* the validity of the Government's contention, it further demonstrates that the trial court committed error when it permitted petitioner to enter his plea without the assistance of counsel.

Apparently, the Government's contention, imposing on petitioner a burden of going forward, envisages some sort of hearing at which petitioner could offer an explanation "suggesting" the propriety of a defense based on self-incrimination under foreign laws. Although petitioner, in layman's language, attempted to articulate the defense that the immunity granted him could not save him from prosecution in Canada (A. 7), the trial court never ordered any hearing to determine the validity of this defense. The trial court's acceptance of a guilty plea from petitioner without ordering such hearing was in conflict with *Von Moltke* v. *Gillies,* 332 U.S. 708, 723-24 (1948). This Court there stated that a plea of guilty without the assistance of counsel may be entered only after the trial judge has made "a penetrating and comprehensive examination of all the circumstances" and has determined that the defendant has full knowledge of all "possible defenses to the charges." This duty imposed on the trial court is even

** The initial issue whether the Fifth Amendment protects against compelling testimony incriminating under foreign laws—fully discussed in the petition—is also raised in the petition for certiorari filed on September 20, 1969 in *Parker* v. *United States,* No. 992.

more serious and weighty here, since the possible defense which the trial court was required to scrutinize involved a claim of self-incrimination. Under *Hoffman* v. *United States,* 341 U.S. 479, 486-88 (1951), a witness is not required to prove his right to claim his self-incrimination privilege; rather the duty rests on the court to sustain the privilege unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers *cannot possibly* have such tendency to incriminate." *Id.* at 488 (emphasis in original).

The trial court's error in rejecting petitioner's defense of self-incrimination without scrutinizing all relevant circumstances, as required by *Von Moltke* and *Hoffman,* was clearly prejudicial. Contrary to the Government's unsupported assertion (Gov't brief p. 9), the record before this Court and the record below indicate that, if the district court had made the required inquiry, the substantiality of petitioner's fear of prosecution under the laws of Canada would have been apparent. Thus, for example, (a) petitioner resided in Canada from 1960 through 1966, when he returned to the United States; (b) in December 1962, petitioner renounced his United States citizenship and thereafter applied for Canadian citizenship (which was later rejected); (c) petitioner's son was born in Canada on January 2, 1962; (d) pursuant to 8 U.S.C. §1253, petitioner, an alien, if deported, would be deported to Canada, "the country from which [he] * * * last entered the United States" (absent acceptance by another country chosen by petitioner); and

(e) the questions which petitioner refused to answer expressly concerned the period he lived in Canada.*

We do not suggest that this Court at this time should determine whether petitioner's fear of prosecution under the laws of Canada was real and appreciable. Rather, this determination should have been made after a searching inquiry into all the surrounding facts and circumstances by the district court prior to its acceptance of any guilty plea without counsel. Since no such inquiry was even attempted, petitioner's conviction should be reversed.

**2. Concerning (a) Petitioner's Misconception, Based on the Trial Court's Advice, that No Procedure Was Available to Validate Petitioner's Exercise of His Privilege Against Self-Incrimination Under Canadian Laws; and (b) the Use of Petitioner's Testimony in an Extradition Proceeding and by Canadian Officials**

The Government's contention, that petitioner was required to explain his self-incrimination claim, exposes another ground for reversal. When petitioner invoked

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* The facts in (a), (b) and (c) above are admitted in the "Government's Response to Defendant's Motion for Allowance of Bail" filed in the Court of Appeals, a copy of which we are herewith filing.

The Government erroneously represents (Gov't brief p. 9), without citation, that petitioner "is presently serving an eighteen month sentence on another federal charge * * *." Even if correct, this circumstance would be irrelevant to petitioner's fear of prosecution. But, the fact is to the contrary: The record makes clear that petition *was* serving an eighteen month sentence on February 14, 1968 when he was brought before the grand jury in Ohio (A. 39). Thus, since it is now more than eighteen months since February 14, 1968, petitioner could not still be serving that sentence. Indeed, petitioner was actually released in November 1968 from incarceration on that unrelated sentence.

the Fifth Amendment as to questions concerning the period he lived in Canada, the district court did not advise petitioner that he might properly decline to answer such questions if he could explain the circumstances which made him apprehensive. Rather, the court responded that petitioner could not "stand on the Fifth Amendment with respect to these matters because you are granted immunity" (A. 7-A. 8). Thus, both after he refused to answer the questions and when he entered his plea, petitioner acted under the misconception that no procedure existed whereby he could validate his refusal to answer questions. To paraphrase this Court's opinion in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 80 (1964), "[f]airness dictates that petitioner should now be afforded an opportunity, in light of" the Government's contention, to present an explanation validating his claim of self-incrimination. As in *Murphy,* the judgment should be vacated and the cause remanded to the district court to grant petitioner that opportunity.

Similar reasoning applies to the Government's contention (Gov't brief p. 10) as to the effect of Rule 6(e), F. R. Crim. P., on the use that may be made of petitioner's grand jury testimony by Canadian officials or in an extradition proceeding. While suggesting that Rule 6(e) precludes such use of grand jury testimony, the Government cites no authority so holding. Indeed, the Government implicitly concedes it to be a question of first impression since it refers to the danger to petitioner as "marginal,"

not non-existent.* At the time petitioner declined to answer questions, he had no basis to conclude that his testimony could not be used against him in Canada or in an extradition proceeding. Again, to paraphrase *Murphy*, if this Court now holds that Rule 6(e) protects petitioner from any such use of his grand jury testimony, "[f]airness dictates that petitioner should now be afforded an opportunity, in light of this development, to answer the questions," by vacating the judgment and remanding to the district court for that purpose.

### 3. Concerning the Government's Reference to the Transcript of Petitioner's Grand Jury Appearances—a Transcript Never Previously Made Available to Petitioner or His Counsel

In its opposing brief (p. 4), the Government refers to, and advises it is filing with this Court, a copy of the transcript of petitioner's appearances before the grand jury. As made clear in the record before this Court (A.51), neither the trial court nor petitioner had a copy of the transcript of the grand jury proceedings. Indeed, petitioner's counsel first examined a copy of that tran-

* Even such a "marginal" danger of incrimination is sufficient to require that the exercise of the privilege against self-incrimination be sustained. The exercise of the privilege can be rejected only if the testimony *"cannot possibly"* incriminate. *Hoffman* v. *United States*, 341 U.S. 479, 488 (1951) (emphasis in original). In addition, the rule that evidence, incompetent in the United States, is admissible in an extradition proceeding if it is admissible in the seeking country, casts some doubt on the Government's observation. Thus, even a constitutional protection, the right "to be confronted with the witnesses against him" (U.S. CONST. AMEND. VI), does not prevent admissibility, in an extradition hearing, of hearsay affidavits and depositions admissible in the seeking country. *E.g.*, *Bingham* v. *Bradley*, 241 U.S. 511, 517 (1916); *Argento* v. *Horn*, 241 F.2d 258, 263 (6th Cir.), *cert. denied*, 355 U.S. 818 (1957).

script following its filing with this Court by the Solicitor General.* More significantly, the Government's reference to and filing of the grand jury transcript further establishes the failure of the trial court to perform its obligation under *Von Moltke* (and *Hoffman*), *i.e.*, to make a "penetrating and comprehensive examination of all the circumstances" before permitting a defendant without counsel to enter a plea of not guilty. Shortly before he entered his plea in the district court, petitioner asked the court if he could "get a copy of what went on in the jury room" (A. 18). Despite this specific inquiry, the court neither reviewed the grand jury transcript nor advised petitioner how he could obtain a copy. Rather, the district court's response was that petitioner's inquiry raised "a rather complicated legal problem" as to which his plea was irrelevant (A. 18-A. 19).

By filing here a copy of the grand jury transcript, the Government indicates that the transcript is relevant to the issues before this Court. A fortiori, that same transcript was relevant to the issues before the trial court. Hence the trial court should not have accepted petitioner's plea of guilty without counsel unless and until it had made "a penetrating and comprehensive examination of" that transcript.

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* The Solicitor General made a copy available to petitioner's counsel after being advised that petitioner and his counsel had never seen the transcript of petitioner's grand jury appearances.

## Conclusion

**The Government's contentions, as discussed above, demonstrate the need for this Court to review the action below; indeed, petitioner suggests that, in view of the Government's position, summary reversal is now appropriate.**

Respectfully submitted,

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January 14, 1970